Filed 9/29/09 In re Michelle S. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re MICHELLE S. et al., Persons Coming Under the Juvenile Court Law.	B211884 (Super. Ct. No. CK73684)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DAVID S. and RITA M., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Marilyn H. Mackel, Referee. Affirmed.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant, David S.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant, Rita M.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, County Counsel, and Tracey F. Dodds, Deputy County Counsel for Plaintiff and Respondent.

INTRODUCTION

Mother Rita M. and father David S. appeal from the dispositional order of the juvenile court that removed four children from their custody. (Welf. & Inst. Code, § 361, subd. (c).)[1] They contend that the evidence does not support the removal order and the finding that reasonable efforts were made to prevent removal. Because the record contains sufficient evidence to support the court's findings by clear and convincing evidence, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The family history*

The petition as sustained recites 11-month-old Sandra's withdrawal from barbiturates at birth; mother's use of heroin while pregnant with Sandra; mother and father's history of physical altercations in front of the children; father's history of substance abuse and criminal history; and father's failure to provide the children with the necessities of life, including food, clothing, and shelter. The parents do not challenge the sufficiency of the evidence to support the court's declaration that the children, Michelle (age 12), Eddie (age 6), Irene (age 3), and Sandra, are described by section 300, subdivisions (b) and (g). They only challenge the evidence to support the court's order removing the children from their custody.

This family first came to the attention of the Department of Children and Family Services (the Department) in April 2005, based on a report that mother's children, Michelle, Eddie, and Irene, were witnessing domestic violence between mother and father, who is the father of Irene and Sandra. Both parents denied that the conflict was *physical*. Mother was pregnant with Sandra and weighed less than 100 pounds. The family had been living in a motel over the previous six to eight months. Michelle had not been to school for months and there was suspicion that the children were not being properly fed. The Department closed the case after father was arrested and ordered to complete a domestic violence program.

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[1] All further statutory references are to the Welfare and Institutions Code.

Then in July 2008, Sandra was born suffering "major" symptoms of withdrawal from methadone and barbiturates. She was placed in the neonatal intensive care unit. Mother's toxicology screen was positive for methadone and Nurontin, a muscle relaxer. Mother only sporadically visited an obstetrician during her pregnancy.

Mother and father had separated five months earlier. Eddie reported that he witnessed father and mother fighting. He stated he had seen father push mother and make her cry. Sometimes, they made him watch. His siblings have seen the fighting. Mother would only talk to the social worker with father present and so the Department was unable to interview mother about domestic violence.

The family appeared to be homeless. They had been evicted from an apartment in Cudahy and, in the months leading to Sandra's birth, were living in a motel and sometimes in a car. Having no place to go the night of Sandra's birth, the maternal grandmother and the children slept in mother's hospital room and hoped father would give them money for a hotel.

The children gave conflicting stories about whether they were regularly fed. Eddie appeared coached when he stated that the children were always fed and had a roof over their heads. He also reported that he was hungry and there was no food. The children's disheveled and under-nourished appearance caused the hospital staff concern. Overhearing the maternal grandmother tell mother she had no money for food and the children had not eaten that day, staff fed the children juice and crackers. The maternal grandmother stated that father did not help the family with rent or support.

Mother had entered a methadone program when she was two months pregnant to treat an addiction to hydrocondone (Vicodin) and a pain reliever (Soma) she had developed after a spinal injury a few years earlier. Father claimed mother was hit by a car and suffered a separated disc and bone spurs, while the maternal grandmother stated mother's back pain was caused by a slip and fall. The three denied that mother abuses drugs. But mother admitted using marijuana as a teenager and heroin during the second trimester of her pregnancy, in addition to Vicodin. Mother dropped out of her methadone program two months after she began and only recommenced two months before Sandra's

birth. Her case manager described mother as a "difficult patient" who did not participate on a weekly basis as required.

Father worked as a security guard and traveled often. He had an extensive history of arrests and convictions between 1986 and 2009 related to drugs, alcohol, and domestic violence. He was also convicted of second degree robbery, carjacking, and using a firearm in 1994, and battery of a spouse. Father was convicted in December 2004 of battery of mother. He completed a 52-week anger management and domestic violence counseling program in April 2007, having originally enrolled in 2001.

Mother and father declined to participate in a voluntary placement, precluding the Department from providing voluntary services. Determining the children were at risk in mother's care, the Department detained them and filed the petition. The juvenile court detained the children in July 2008 and declared father the presumed father of Irene and Sandra.

2. *After the detention hearing*

Father and mother were living together, contrary to the information they gave the Department. Claiming the two had reconciled, father stated he did not intend to live separately from mother. The parents were considering marriage.

Sandra was still hospitalized a month after her birth and was being weaned off methadone by using morphine. The hospital was considering using Phenobarbital to minimize her tremors and the staff was concerned that Sandra would have neurological damage.

After the children were detained, mother became more compliant and open to working on her addiction. However, she tested positive for heroin and codeine after Sandra's birth. In August 2008, mother submitted a letter from a clinic in Hesperia stating she was participating in a methodone treatment program and another letter stating that mother had registered as a participant in a 16-week parenting class.

Father did not understand why the Department recommended he participate in a substance abuse program, insisting his drug history was old, although he admitted he was under trial-court orders to complete alcohol treatment by the fall of *2008* because of a

recent arrest for driving while under the influence. Father registered for a parenting course and had attended six group sessions by August 2008. He made no attempts to visit the children and did not return messages from the Department. It did not appear to the social worker that he was "genuinely interested in reunifying."

By the time of the jurisdiction hearing in late October 2008, mother was complying with her drug treatment program. She was being weaned from methadone and was cooperative, appearing for her counseling sessions. She tested negative for drug four times in September and twice in October 2008. However, the Department received no verification that mother had enrolled in a domestic violence program. Furthermore, mother was inconsistent in her visits. Father never arranged visits. Mother submitted to the petition.

3. *The jurisdiction hearing*

At the jurisdiction hearing, father demonstrated his completion of 52 sessions of domestic violence in April *2007*, and his completion of 12 sessions of parenting classes in October 2008. Mother completed a parenting course in October 2008. Father testified the last time he was arrested on a drug charge was in 1991 and he got sober on his own. He admitted using PCP in the past but dealt with it on his own. He denied any violence against mother after his conviction for it in 2004. Father denied pushing mother or that Eddie ever witnessed a physical altercation between father and mother. As for his conviction for driving under the influence in February 2008, he testified he completed his work release program and participated in mandated alcohol program. With the exception of that arrest, father testified he always provided for his children.

Mother explained that the fighting Eddie witnessed was "play" and that she and father merely argue. She lost contact with father between December 2007 and Sandra's birth. Mother presented a letter confirming that as of October 27, 2008, she was "drug free."

The juvenile court sustained the petition as amended, declaring the children described by section 300, subdivisions (b) and (g). The court found the family minimized its substance abuse. It also expressed "considerable concern" that father either did not

accept responsibility for, or was unaware of, the nature and quality of the arguments between the parents, and that mother minimized their conflicts. The court found these so-called arguments "amount[ed] to domestic discord between the parents and that those have been recent in nature . . . ."

The juvenile court found "by clear and convincing evidence that return of the children to the care and custody of the parents pose[d] substantial risk and detriment [to them]. [¶] Reasonable efforts have been made by the Department," and ordered the children removed from their parents and suitably placed in the care and custody of the Department. The court ordered the parents to participate in reunification services. Finding that both parents had made substantial progress toward alleviating or mitigating the causes necessitating placement of the children, the court gave mother and father unmonitored visits in the children's placement and at the Department. The court gave the Department discretion to liberalize visits, once the parents provided clean test results. Mother and father separately appealed. Thereafter, the juvenile court transferred the matter to the San Bernardino County juvenile court.

CONTENTIONS

Mother and father both contend that there was insufficient evidence to support the juvenile court's dispositional order removing the children from parental custody and the court failed to make a finding that there were no reasonable means to protect the children if returned to her care.

DISCUSSION

To remove children from their parents' custody, the juvenile court must find clear and convincing evidence that there is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the children if they were returned home, *and* there are no reasonable means by which the children's health can be protected without removal. (§ 361, subd. (c)(1).) While the juvenile court must find clear and convincing evidence, we review the court's ruling for sufficiency of the evidence to support its conclusion. (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881.) The record here supports the juvenile court's findings.

Mother has a history of drug dependence that has had a seriously destructive impact on her children. Sandra was born with a toxicology screen for methadone and barbiturates because of mother's drug use. In the neonatal intensive care unit, the newborn suffered "major" symptoms of withdrawal including ongoing addiction to methadone. Doctors were considering giving the baby Phenobarbital to minimize her tremors and were concerned about the neurological damage as the result of mother's drug use. Although mother voluntarily entered a methadone treatment program early in her pregnancy, she did not consistently or successfully participate. She left for four months and did not resume until two months before Sandra's birth. Not only did she use heroin during the second trimester of pregnancy, but even after the children were detained, mother tested positive for heroin and codeine.

Mother points to her six clean tests, regular attendance in counseling sessions, and reduction in her weekly methadone dose, all at her new treatment program. She is to be commended for her efforts. But, given the long record of drug use and her history of relapses both before and after the children's detention, negative tests for five weeks between September 9 and October 15, 2008, is not enough to overcome the overwhelming evidence that the children are at serious risk of harm if left in her care. (Cf. § 300.2 ["The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child."].)

Father's substance abuse also clearly places the children at risk. While he insists that it is ancient history, father has been arrested or cited for a substance-related offense *eight times over 22 years*, including 2001, and his latest arrest was in *2009*. Father has not only failed to change his behavior, but persists in denying it is a problem. His assertion to the contrary notwithstanding, it makes no difference that father was separated from mother at the time of his arrest because his substance abuse remains untreated and he is living with mother, thus clearly putting the children at substantial risk of harm.

Moreover, father has failed to provide this family with support and so they are hungry, underweight, and homeless. Father overlooks that one of the specific categorical

bases for removing a child from a parent's custody is that "The minor has been left without any provision for his or her support . . . ." (§ 361, subd. (c)(5).) This record is replete with evidence that father has left this family without food or shelter and of the harmful consequences of that neglect.

Serious substance abuse is not the only danger to this family. The court had evidence that domestic violence between mother and father is recent and ongoing, unacknowledged and untreated. Eddie stated " 'I've seen them fighting. [Father] yells at my mom a lot. Sometimes when they start fighting, they tell me to go outside. Sometimes they tell me to come inside. I don't like coming inside because then I see them.' " Asked whether mother or father has hit the other, Eddie stated, " 'He's pushed my mom, made her cry. I just go outside but sometimes they make me stay there and watch.' " Eddie also reported that his siblings have witnessed the fighting. Thus, the record shows there are many, recent incidents of physical violence, not merely two single *arguments*, as mother would characterize it or remote in time, as father asserts.

" '[S]pousal abuse is detrimental to children . . . .' [Citations.]" (*In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562), which can sow in children seeds of psychological predisposition to be victims of domestic violence. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 195.) " 'Studies show that violence by one parent against another harms children *even if they do not witness it*.' " (*In re Sylvia R., supra*, at p. 562, italics added, quoting Fields, The Impact of Spouse Abuse on Children and Its Relevance In Custody and Visitation Decisions in New York State (1994) 3 Cornell J.L. & Pub. Pol'y 221, 228.) While the cases above cited involved the jurisdictional findings that are sustained on the lesser standard of preponderance of the evidence that the children are at serious risk of harm (§§ 300, subd. (b) & 355, subd. (a)), the danger to these children is all the more clear and convincing here because neither father nor mother admits to the domestic violence. Neither has enrolled in a domestic violence program since the petition was sustained containing the abuse allegations. Mother justifies this by stating merely that there is no reason to believe she would not immediately seek counseling. But, the amended petition was filed in August 2008 and mother had not enrolled in a

program by the end of October 2008. Father acknowledges that only Eddie has witnessed the domestic abuse, and minimizes the violence by insisting that he was last *convicted* of domestic abuse in *2004*. Yet, the record discloses that father has been arrested numerous times since 2004 for domestic violence. And, the Department was notified of domestic violence in 2005, when father was arrested and ordered into a domestic violence program, which program he dropped out of and did not finally complete until 2007. Hence, not only is father incorrect that his last episode was 2004, but the record shows that he remains a recidivist when it comes to domestic violence. That the parents are living together again exposing the children to further domestic violence is another reason the evidence supports the juvenile court's removal order.

"[O]ut-of-home placement is . . . . a last resort, to be considered only when the child would be in danger if allowed to reside with the parent. The law requires that a child remain in parental custody pending the resolution of dependency proceedings, despite the problems that led the court to take jurisdiction over the child, unless the court is clearly convinced that such a disposition would harm the child. The high standard of proof by which this finding must be made is an essential aspect of the presumptive, constitutional right of parents to care for their children. [Citations.]" (*In re Henry V.* (2004) 119 Cal.App.4th 522, 525.) That high standard has more than adequately been met here. These children are endangered by their parents' drug addiction and substance abuse, domestic violence, and failure to provide for the children's basic needs. Mother has made earnest first steps at conquering her entrenched addiction, but five weeks of sobriety is not enough given her history of relapses. While she has addressed certain other problems that led to the dependency, she has not begun to acknowledge or tackle the problem of domestic violence. Father has not accepted that his history of substance abuse and domestic violence is entrenched and recent and so he has not begun to address his problems. The parents are living together and considering marriage. The evidence is overwhelming that these issues expose the children to substantial danger of harm to their physical health, safety, protection, and their physical or emotional well-being if they are returned to their parents' custody.

The parents contend that the juvenile court failed to make the necessary finding of the second portion of the test under section 361, subdivision (c)(1), namely, that "there are no reasonable means by which the minor's physical health can be protected without remov[al]." (See also, § 361, subd. (d).) To the contrary, immediately before ordering the children removed from their parents' custody, the juvenile court stated: "Reasonable efforts have been made by the Department. . . ." A fair reading of the sentence fragment indicates that the court was making the necessary finding. Moreover, the record supports the court's finding. The parents rebuffed the offer of voluntary services thereby forcing the Department to seek the children's removal. In fact, father saw no need for services and did not understand why or how his history of substance abuse or domestic violence affected his ability to care for the children. Nor has mother taken steps to address all of the serious and troubling aspects of this dependency.

Next, father argues that the court failed to satisfy the mandate in section 361, subdivision (d) that the court "state the facts on which the decision to remove the minor is based." However, the record supports the court's conclusion and its stated reason for the removal decision. The court expressed its concern that the parents were either not minimizing or failing to acknowledge the seriousness of the domestic violence and the substance abuse. The court stated: "You can call it alcohol. You can call it drugs. Its just abuse. Its abuse when it results in a DUI. Its abuse when it impacts your life. When you have to do other things such as going to a program as a result of it, getting arrested as a result of it." There was no error here.

DISPOSITION

The order is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.